In the High Court of Judicature at Madras

Dated : 02..12..2006

C O R A M

The Honourable Mrs. Justice Prabha Sridevan

Criminal R.C. Nos.781 to 786 of 2006
and
M.P.No.1, 2, 2 and 2 of 2006

J. Jayalalitha .. Petitioner in Crl. R.C. No.781 of 2006(Accused No.2)

Sasi Enterprises,
Rep. By its Partner V.K. Sasikala,
14, Parsn Manere,
602, Anna Salai, Chennai-6. .. Petitioner in Crl. R.C. No.782 of 2006(Accused No.1)

J. Jayalalitha .. Petitioner in Crl. R.C. No.783 of 2006(Accused No.2)

Sasi Enterprises,
Rep. By its Partner V.K. Sasikala,
14, Parsn Manere,
602, Anna Salai, Chennai-6. .. Petitioner in Crl. R.C. No.784 of 2006(Accused No.1)

Selvi J. Jayalalitha .. Petitioner in Crl. R.C. No.785 of 2006(Accused No.1)

V.K. Sasikala .. Petitioner in Crl. R.C. No.786 of 2006(Accused No.1)

Versus

The Asst. Commissioner of Income Tax,
Central Circle II(5),
Madras. .. Respondent

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Prayer : Criminal Revisions under Section 397 r/w. 401 of Cr.P.C. against the orders dated 14.6.2006 passed in M.P. No.1784 of 2004 in E.O.C.C. No.202 of 1997, M.P. No.1784 of 2004 in E.O.C.C. No.202 of 1997, M.P. No.1785 of 2004 in E.O.C.C. No.203 of 1997, M.P. No.1785 of 2004 in E.O.C.C. No.203 of 1997, M.P. No.1782 of 2004 in E.O.C.C. No.161 of 1996 and M.P. No.1783 of 2004 in E.O.C.C. No.194 of 1997, on the file of the Additional Chief Metropolitan Magistrate (E.O.I), Chennai.

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For Petitioners: Mr. Guru Krishnakumar and
Mr. Subramanium Prasad for
Mr. N. Jothi, Assisted by
Mr. L.P. Shanmugha Sundaram,
Mr. A. Kandasamy and
Mr. V. Karthikeyan.

For Respondents: Mr. Gopal Subramaniam,
Additional Solicitor General of India,
Assisted by Mr. K. Ramasamy,
Senior Public Prosecutor for I.T. Cases,
Mr. S. Rajappa and
Mr.P.Wilson,Asst.Solicitor General of India

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O R D E R

The petitioners' applications for discharge filed under Section 245 of the Code of Criminal Procedure were dismissed. They have filed these revisions.

2. Briefly stated, the facts of the case are as follows :

The petitioner in Crl. R.C. Nos.781, 783 and 785 of 2006 (hereinafter referred to as 'the first petitioner') was required to file return of income for the Assessment Year 1993-94 under Section 139(1) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') by 31st August, 1993. The first petitioner failed to furnish the return of income. A notice was sent to the first petitioner under Section 142(1) on 18.1.1994, calling upon her to file the return of income within a period of 30 days from the date of service of the notice. This notice was served on the first petitioner on 19.1.1994. The period of 30 days expired, but no return was filed in compliance to the notice. Reminders were sent on 22.8.1994, 10.2.1995 and 23.8.1995, yet the return was not filed. Subsequently, a notice under Section 142(1)(ii) of the Act was issued on 31.7.1995, calling upon the first petitioner to produce the accounts since as per the Act, assessments need to be completed by March 31, 1996. The first petitioner failed to furnish the return of income and also failed to comply with the statutory notice. A best judgment assessment was completed under Section 144 of the Act on 9.2.1996 and penalty proceedings for concealment of income were initiated under Section 271(1)(c) of the Act. Penalty proceedings were also initiated for non-compliance of the notice under Section 271(1)(b) of the Act. A demand inclusive of interest was made. The first petitioner challenged the assessment order before the Commissioner of

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Income Tax (Appeals). This appeal was partly allowed by order dated 28.2.1997. The department has challenged that order in Appeal No.1239 of 1997. The first petitioner has also challenged that order. Both the Appeals are pending. On 14.10.1996, complaints were filed against the first petitioner and the other petitioners for the offence under Section 276CC of the Act. Thereafter, there have been several proceedings initiated at the instance of the first petitioner before the Magistrate's Court and also before the High Court. It is not necessary for the purpose of deciding these revisions to refer to all of them in detail or to refer to the facts in each case, since they are more or less similar.

3. On 12.5.2004, an application under Section 313 of the Code of Criminal Procedure was filed by the respondents for examining the first petitioner. On the same day, the first petitioner filed an application under Section 245 of the Code for discharging her from the prosecution proceedings. Other petitions were also filed. The respondents filed petitions before this Court for a direction to the trial court to frame charges against the petitioners. The petitioners filed application under Section 482 of the Code to quash the proceedings. The petitions filed by the respondents were dismissed by this Court. Against this, the department filed Special Leave Petitions, which were disposed of by the Supreme Court, directing the trial court to consider the matter regarding framing of charge, after hearing the parties on the petition for discharge, within a period of two months. Thereafter, the trial Magistrate dismissed the discharge petitions and fixed the date for commencement of hearing as per the directions of the Supreme Court. The learned Magistrate directed the accused to be present in Court on 25.8.2006. The first petitioner has filed the revision against the dismissal of the discharge petition. She has also filed a writ petition challenging the constitutional validity of Section 278E of the Act.

4. The following grounds have been raised by the revision petitioners :

(1) The trial court failed to consider that the ingredients for the offence were not satisfied and the alleged offence is not complete.

(2) The determination of the quantum of tax liability and finality of assessment proceedings are important for invoking Section 276CC.

(3) Section 276CC(i) and (ii) refer to amount of tax and therefore, without the quantum of tax liability being determined, there can be no proceedings.

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(4) The proviso to Section 276CC excludes the invocation of the Section against persons where tax payable on the total income determined on regular assessment is less than Rs.3,000/-. Regular assessment is defined in Section 240 of the Act and it reads as follows :

> "Regular Assessment" means the assessment made under sub-section (3) of Section 143 or Section 144."

(5) Therefore, since the assessment proceedings have not attained finality, it is a very relevant point which the trial Magistrate ought to have borne in mind.

(6) The documents filed would show the factual position as to the filing of appeals against the assessment orders in the context of the quantum of tax liability and non-consideration thereof has resulted in the unjustified order refusing discharge.

(7) In particular, it is pointed out by the learned counsel for the petitioners that as regards the firm, the tax liability has been assessed to be 'Nil' and there is no taxable income for the firm to be prosecuted. This has not been countered by the prosecution.

(8) As regards the status of the proceedings against the first petitioner, as against the best judgment assessment, the first petitioner preferred an appeal and a substantial relief was granted by the appellate authority by scaling down the tax liability by almost one-third from the original assessment. This has also not been countered by the prosecution.

(9) The prosecution acted in an unfair manner as can be seen from the evidence of P.W.3, who is the very complainant in all the four prosecutions and who has said that he is not aware whether any appeal has been filed, though he is the Officer under whose signature the appeal has been preferred.

(10) It is not correct to state that the proviso is confined to cases of non-filing of return under Section 139(1)(a). The proviso also gives exception to sub-clause (2) which provides for punishment for non-filing of returns in any other case. Therefore, it would cover all cases of non-filing of returns where the tax amount is less than rupees one lakh.

(11) The finality of assessment proceedings would have to be considered while arriving at a decision whether prosecution should be continued.

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(12) The Magistrate has acted as a post office or a mouth piece of the prosecution, contrary to the Supreme Court's dictat in (2002) 2 S.C.C. 135 [Dilawar vs. State].

(13) The Magistrate did not take note of the power available under Section 91 of the Code of Criminal Procedure for production of documents which are necessary or desirable.

(14) The Magistrate did not consider from the proper perspective the various submissions with regard to arraying the first petitioner as a co-accused, though she was only a dormant partner of the firm, as evidenced by several exhibits; the department was aware that iot was the other partner who was running the affairs of the firm; the complaint did not set out any averments as to the negligence of the first petitioner in the affairs of the firm except to state that she was in charge and responsible.

(15) The department conducted a survey, but took no steps to identify the person in charge, as would be evident from the evidence of P.W.2.

(16) The legal position as to the persons who could be held responsible in the context of the business of the company is well settled. Reference is made to (2005) 8 S.C.C. 89 [S.M.S. Pharmaceuticals vs. Neeta Bhalla], wherein it has been held thus :

> "Every person connected with the company shall not fall within the ambit of the provision. .....
>
> Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action."

(17) The trial Magistrate has not considered the validity of the sanction granted under Section 279(1) of the Act. This sanction is a pre-requisite for valid prosecution, as it lifts the bar to a prosecution. The requirements of a valid prosecution have been set out by the Supreme Court in (1997) 7 S.C.C. 622 [Mansukhlal vs. State of Gujarat) Wherein it has been held thus :

> "Since the validity of sanction depends on the applicability of mind by the sanctioning authority to the facts of the case as also the material and evidence collected during investigation, it necessarily follows that the sanctioning authority has to apply its own independent mind for the generation of genuine satisfaction whether prosecution has to be sanctioned or not. The mind of the sanctioning authority should not be under pressure from any

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quarter nor should any external force be acting upon it to take a decision one way or the other. Since the discretion to grant or not to grant sanction vests absolutely in the sanctioning authority, its discretion should be shown to have not been affected by any extraneous consideration. If it is shown that the sanctioning authority was unable to apply its independent mind for any reason whatsoever or was under an obligation or compulsion or constraint to grant the sanction, the order will be bad for the reason that the discretion of the authority not to sanction was taken away and it was compelled to act mechanically to sanction the prosecution."

The sanction in the present case does not meet the requirements of law and has been influenced by the opinions of the Special Public Prosecutor.

(18) The sanction is wholly vitiated as it does not take into account the crucial aspects namely stage or status of the assessment proceedings, the prima facie satisfaction of willfulness and other important materials.

(19) The impugned order is unsustainable in the light of the status of penalty proceedings, in view of the decision in (2004) 2 S.C.C. 731 [K.C. Builders vs. Assistant Commissioner of Income Tax].

(20) The satisfaction as to the existence of a prima facie case ought and cannot be reached by merely accepting the prosecution case as it is, but by sifting the evidence,albeit for a limited purpose of finding out a prima facie case.

5. In reply, the respondents have contended as under :

(1) Section 276CC of the Act seeks to punish the act of wilful failure to furnish in due time a return of income under sub-section (1) of Section 139 or abide by the notice given under Section 142(1) or Section 148 of the Act. The statutory 'due date' was August 31 for the relevant assessment years in all the four cases.

(2) The proviso to Section 2786CC postulates that the return would have been filed under Section 139(1), even though it may not have been filed in due time. The said proviso has no relevance where no return had been filed either with reference to Section 139 or with reference to a notice under Section 142(1) or Section 148. The proviso is, therefore, inapplicable.

(3) The learned trial Magistrate had formed a prima facie opinion, on examining the documents exhibited by the prosecution and the deposition of the witnesses and found that there were grounds to

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presume that the petitioners have committed the offence under Section 276CC and had, therefore, rightly rejected their applications for discharge, for which reliance is placed on (1986) 2 S.C.C. 587 [State of U.P. vs. Manmohan].

(4) The respondents refer to (2004) 9 S.C.C. 686 [Prakash Nath Khanna v. C.I.T.], where the Supreme Court has held that the question whether there was wilful failure to file the return must be adjudicated factually by the Court which deals with the prosecution case.

(5) The assessment of income of an assessee who has failed to furnish an income tax return has no relevance to the initiation or continuation of prosecution, as has been held by the Supreme Court in (1984) Supp. S.C.C. 437 [P. Jayappan vs. S.K. Perumal, 1st I.T.O.], where it was held that mere expectation of success in some other pending proceedings can never bar a criminal prosecution if the ingredients of the offence charged are prima facie fulfilled.

(6) In any event, in this case, since no return has been filed till date, the offence still continues as the petitioners have not disclosed their true and correct income in the prescribed form, as required under Section 139(1) of the Act. Reliance is placed on A.I.R. 1986 S.C. 293 [Maya Rani Punj vs. Commissioner of Income Tax], where it was held that the non-complaince with the obligation of making a return is an infraction as long as the default continues and therefore, the fact as to the pendency of the adjudication proceedings will have no bearing on the prosecution proceedings pending against the petitioners herein for non-filing of return. The proviso will only apply in those cases where the assessees have filed their returns voluntarily before detection or before issuance of the statutory notices.

(7) As regards the Court's power to discharge the accused, (1977) 4 S.C.C. 39 [State of Bihar vs. Ramesh Singh] is referred to, where it has been held as follows :

> "The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. If the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial."

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Reliance is also placed on (2000) 6 S.C.C. 338 [State of M.P. vs. Mohanlal Soni], where it has been held thus :

> "The crystallised judicial view is that at the stage of framing charge, the court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The court is not required to appreciate evidence to conclude whether the materials produced are sufficient or not for convicting the accused."

(1989) 1 S.C.C. 715 [Stree Atyachari Virodhi Parishad vs. Dilip Nathumal Chordia] is also relied on, where it has been held thus :

> "The court, therefore, need not undertake an elaborate enquiry in sifting and weighing the material. Nor is it necessary to delve deep into various aspects. All that the court has to consider is whether the evidentiary material on record, if generally accepted, would reasonably connect the accused with the crime. No more need be enquired into.

In the same judgment, it has been further held as follows :

> "If the Sessions Judge, after hearing the parties, frames a charge and also makes an order in support thereof, the law must be allowed to take its own course. Self-restraint on the part of the High Court should be the rule unless there is a glaring injustice which stares the court in the face. The opinion on any matter may differ depending upon the person who views it. There may be as many opinions on a particular matter as there are courts, but it is no ground for the High Court to interdict the trial. It would be better for the High Court to allow the trial to proceed."

(8) In this case, the learned trial Magistrate was satisfied that there was a prima facie case that the petitioners had no intention to file their returns and therefore, he refused to discharge them from the proceedings.

(9) The Magistrate also, after going through the deposition of the sanctioning authority, P.W.4 and the documents exhibited by the prosecution, came to the conclusion that the relevant documents had in fact been placed before the sanctioning authority, who on an application made, granted sanction.

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(10) In 1997 (7) S.C.C. 622 [Mansukhlal Vithaldas Chauhan vs. State of Gujarat], while dealing with the issue of judicial review of an order granting sanction, the following observations were made by the Supreme Court :

> "This principle was reiterated in Tata Cellular v. Union of India (1994) 6 SCC 651 in which it was, inter alia, laid down that the Court does not sit as a court of appeal but merely reviews the manner in which the decision was made particularly as the Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted, it will be substituting its own decision which itself may be fallible. The Court pointed out that the duty of the Court is to confine itself to the question of legality. Its concern should be :
>
> 1. Whether a decision-making authority exceeded its powers?;
> 2. committed an error of law;
> 3. committed a breach of the rules of natural justice;
> 4. reached a decision which no reasonable tribunal would have reached; or
> 5. abused its powers."

Similarly, in 2005 A.I.R. S.C.W. 1684 [C.S. Krishnamurthy vs. State of Karnataka], the Supreme Court has upheld the sanction, since the sanctioning authority deposed about application of mind. In the present case, P.W.4, who is the sanctioning authority, has deposed about the independent application of mind for determining that the case warranted sanction for prosecution.

(11) Reliance was also placed on 242 I.T.R. 39 [Sonarome Chemicals Pvt. Ltd. vs. Union of India], where a learned single Judge of the Karnataka High Court has held thus :

> "The constitutional validity of Section 276C was challenged in the case of Dr. (Mrs.) M.S. Dhowani vs. J. Ranganathan, Second ITO, [1992] 194 ITR 690 (Mad), on the ground of violation of Article 14 of the Constitution, contending that, Section 276C(1) provides for a minimum imprisonment of six months and under clause (2), the minimum sentence prescribed was only three months which is contrary to the concept of equality. The court observed

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that the sub-sections operate in different fields and that there is a rationale behind the classification, the equality contemplated under Article 14 of the Constitution cannot be considered to have been violated. The contention which has been raised is based mainly on the ground that since the respondents have already been compensated, Parliament could not have enacted the provision for prosecution for the same default. There is no illegality or lack of jurisdiction with Parliament in making a provision for prosecution even in a case where the interest is charged which stands on different footing than the offence for which the punishment is provided. In these circumstances, this contention has no force."

6. Mr. Guru Krishnakumar, learned counsel appearing for the petitioners and Mr. Gopal Subramaniam, learned Additional Solicitor General of India appearing for the respondent made detailed submissions and also submitted their written arguments, followed by supplementary arguments. Several decisions were cited by the learned counsel on either side in support their respective submissions and since many of them reiterated the same points, only the important ones will be referred to.

7. The learned trial Magistrate had come to the conclusion that a prima facie case had been made out, largely based on the statutory presumption under Section 278E of the Act, the constitutional validity of which was challenged in Writ Petition Nos.23581 to 23584 of 2006. Those writ petitions have been dismissed today by a separate order. Therefore, the petitioners cannot question in revision, the correctness of the learned Magistrate presuming the culpable mental state of the petitioners, and their challenge as to the correctness of the order passed by the trial Magistrate on other grounds alone has to be examined.

8. The relevant portions of the complaint preferred against the first petitioner read as under :

"The accused ought to have filed her Return of Income for the Assessment Year 1993-94 on or before 31.8.1993 as required under Section 139(1) of Income-tax Act, 1961. However, the accused did not file her Return of Income within the due date prescribed by the Statute. Thus, the accused has wilfully and deliberately contravened the provisions of Section 139(1) of Income-tax Act, 1961 by not furnishing her return of income on or before the due date prescribed by the Statute, i.e., 31.8.1993 without any valid reason and thereby committed an offence punishable under Section 276CC of the Income tax Act, 1961."

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"As there was no statutory compliance of filing the return of income within the due date, and as the failure in filing the said return of income still persisted, a notice under Section 142(1) of the Income tax Act, 1961 was issued to the accused on 18.1.94 calling upon her to file the Return of Income within 30 days from the date of receipt of the notice which was served by R.P.A.D. on 19.1.1994. The accused neither sent any reply in response to the said statutory notice issued to her nor filed her return of income. Therefore, a reminder letter dated 22.8.1994 was issued to the accused requesting her to file the return of income at the earliest. Again, there was no response from the accused and not even a reply was sent giving reasons why she is persisting in delaying the filing of the said return of income even after the statutory due date and inspite of receiving the statutory notice u/s.142(1). By another letter dated 10.2.95, the accused was again reminded of her statutory obligation of filing of her Return of Income by requesting her to file the return immediately. Another letter dated 23.8.1995 was issued to the accused informing her that the return was not filed in due time; that there was no compliance to notice u/s.142(1) dated 18.1.94; that reminders were issued on 2.8.1994 and 10.2.1995 and that due to lack of response, a notice u/s.142(1) was issued on 31.7.1995 calling for certain details relevant for assessment. The failure in furnishing the return of income continued even after the receipt of the above mentioned letters. Thus, the accused completely disregarded the statutory requirements by wilfully failing to furnish her return under section 139(1) and also deliberately did not file the return even after the receipt of notice issued to her under section 142(1), two reminder letters dated 22.8.1994 and 10.2.1995 and further letter dated 23.8.95."

"..... In order to conduct inquiry to complete the assessment, a statutory notice under Section 142 (1) with a covering letter was issued to the accused on 31.7.1995 requiring the accused to furnish the following information :

....."

"The Complainant states that as the accused wilfully failed to furnish her return of income and deliberately did not file the said return at all for the Assessment Year 1993-94 inspite of receiving statutory notice and despite giving of opportunities, show cause notice dated 14.6.1996

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and 10.7.1996 were issued to the accused asking her to explain why prosecution proceedings under Section 276CC of Income-tax Act, 1961 should not be initiated against her. ....."

"..... The reasons given by the accused for such an inordinate delay are not tenable and cannot be accepted. Pre-occupations in official as well as party meetings cannot take over-riding precedence over statutory duties. The pesons in public life should respect and obey the rule of law and set an example for others. ....."

"The above facts clearly establish that the accused was bent upon deliberately not to file her return of income at all and she was willingly welcomed the exparte assessment order for reasons best known to her. There is every reason to believe that in the circumstances of the case, the assessee might have really benefitted by inviting an experate assessment and that may be the reason why the relevant return was not filed at all. The accused was not co-operative in the inquiry. ....."

9. As regards the petitioner in Crl. R.C. No.786 of 2006 (hereinafter referred to as 'the second petitioner'), the complaint refers to the default in filing the return under Section 139(1) of the Act and that there was a wilful and deliberate contravention. In paragraph 10 of the complaint, there is reference to utter disregard in complying with the statutory obligation and wilful and deliberate in filing of the return of income in response to notice under Section 142(1) and that no valid return was filed at all for the Assessment Year 1993-94. The second petitioner has also given reasons as to why she could not file her returns and the circumstances under which the delay occurred. The relevant portions of the complaint preferred against the second petitioner read as under :

"..... The reasons given by the accused for not filing the return at all do not carry any conviction. Being untenable they cannot be accepted. The presumption relating to culpable mental state u/s.278E of the I.T. Act, 1961 squarely applies to this case. ....."

"..... The said offence committed by the accused is a continuing offence."

10. As regards the petitioner in Crl. R.C. Nos.782 and 784 of 2006, a Partnership Firm (hereinafter referred to as 'the firm') the relevant portion of the complaint preferred jointly against the firm as well as the first and second petitioners herein (arrayed in the complaint as Accused-1, Accused-2 and Accused-3 respectively), there

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is specific allegation that the first petitioner, viz. Accused-2 and the second petitioner, viz. Accused-3 were in charge of Accused-1/firm, and were responsible for the conduct of the day to day business of the firm and also they are individually, jointly and severally responsible and liable for all the activities and defaults of the Accused-1 firm and as per the Deed of Partnership dated 4.5.1990 of Accused-1, its partners, viz. Accused-2 and Accused-3 are equally responsible and empowered to :

i) operate bank accounts;

ii) have full and equal rights in the management of the firm for its business activities;

iii) deploy funds for the business of the firm;

iv) appoint staff, watchmen etc.; and

v) represent the firm before Income-tax Sales-tax and other authorities, etc.

Apart from the allegations regarding wilful and deliberate failure to furnish the return under Section 139(1) of the Act and for failure to respond to the notice under Section 142(1) of the Act, it is also stated in the complaint as follows :

> "In terms of the partnership deed and in accordance with the Partnership Act, all the partners are jointly and severally responsible and liable for all the activities of omissions and commissions of the partnership firm. Thus, Accused-2 while enjoying the fruits of partnership has to bear the duties and responsibilities cast on her in carrying out and discharging the statutory obligations. The Accused-2 was aware of the fact of non-filing of the return of income of the Accused-1 firm as is evident from the notings from her own statement of total income. There is nothing like 'Dormant Partner' under the Law."

11. The relevant provisions of law can be referred to at this stage. Section 276CC of the Income Tax Act, 1961 reads thus :

> "Failure to furnish returns of income.
>
> 276CC. If a person wilfully fails to furnish in due time the return of fringe benefits which he is required to furnish under sub-section (1) of section 115WD or by notice given under sub-section (2) of the said section or section 115WH or the return of total income which he is required to furnish under sub-section (1) of section 139 or by notice

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given under clause (i) of sub-section (1) of section 142 or section 148 or section 153A, he shall be punishable,-

(i) in a case where the amount of tax, which would have been evaded if the failure had not been discovered, exceeds one hundred thousand rupees, with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;

(ii) in any other case, with imprisonment for a term which shall not be less than three months but which may extend to three years and with fine.

Provided that a person shall not be proceeded against under this section for failure to furnish in due time the return of fringe benefits under sub-section (1) of section 115WD or return of income under sub-section (1) of section 139 -

(i) for any assessment year commencing prior to the 1st day of April, 1975; or

(ii) for any assessment year commencing on or after the 1st day of April, 1975, if -

(a) the return is furnished by him before the expiry of the assessment year; or

(b) the tax payable by him on the total income determined on regular assessment, as reduced by the advance tax, if any, paid, and any tax deducted at source, does not exceed three thousand rupees."

Section 279 of the Income Tax Act, 1961 reads thus :

"Prosecution to be at instance of Chief Commissioner or Commissioner.

279. (1) A person shall not be proceeded against for an offence under section 276BB, section 276C, section 276CC, section 276D, section 277, section 277A or section 278 except with the previous sanction of the Commissioner or Commissioner (Appeals) or the appropriate authority :

Provided that the Chief Commissioner or, as the case may be, Director General may issue such instructions or directions to the aforesaid income-tax authorities as he may deem fit for institution of proceedings under this sub-section."

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Section 245 of the Code of Criminal Procedure reads thus :

> "245. When accused shall be discharged. - (1) If, upon taking all the evidence referred to in section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.
>
> (2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless."

12. The judgment in (2004) 9 S.C.C. 686 [Prakash Nath Khanna v. C.I.T.] answers almost every question raised by the petitioners herein. The words "in due time" occurring in Section 276CC of the Income Tax Act were interpreted in this decision and it was held that even if a return is filed in terms of sub-section (4) of Section 139, that will not dilute the infraction in not furnishing the return in due time. The following words are relevant :

> "..... There is no condonation of the said infraction, even if a return is filed in terms of sub-section (4).

In the above case, the contention that Section 276CC is applicable only when there is discovery of the failure regarding evasion of tax was also rejected, as also the contention that the return under Section 139(4) was filed before the discovery of failure regarding evasion, stating that the provision has no application. It was held by the Supreme Court as follows :

> "The provision consists of two parts. First relates to the infractions warranting penal consequences and the second, measure of punishment. The second part in turn envisages two situations. The first situation is where there is discovery of the failure involving the evasion of tax of a particular amount. For the said infraction stringent penal consequences have been provided. Second situation covers all cases except the first situation elaborated above."

The question whether there is a wilful failure was also held to be a matter upon which there should be a factual adjudication by the Court and while the Court has to presume the existence of culpable mental state as per Section 278E, it was certainly "open to the appellants

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to plead the absence of culpable mental state when the matter is taken up for trial". The following paragraphs are relevant :

> "One of the significant terms used in Section 276-CC is 'in due time'. The time within which the return is to be furnished is indicated only in sub-section (1) of Section 139 and not in sub-section (4) of Section 139. That being so, even if a return is filed in terms of sub-section (4) of Section 139 that would not dilute the infraction in not furnishing the return in due time as prescribed under sub-section (1) of Section 139. Otherwise, the use of the expression 'in due time' would lose its relevance and it cannot be said that the said expression was used without any purpose. Before substitution of the expression 'clause (i) of sub-section (1) of Section 142' by the Direct Tax Laws (Amendment) Act, 1987 w.e.f. 1-4-1989, the expression used was 'sub-section (2) of Section 139'. At the relevant point of time the assessing officer was empowered to issue a notice requiring furnishing of a return within the time indicated therein. That means the infractions which are covered by Section 276-CC relate to non-furnishing of return within the time in terms of sub-section (1) or indicated in the notice given under sub-section (2) of Section 139. There is no condonation of the said infraction, even if a return is filed in terms of sub-section (4). Accepting such a plea would mean that a person who has not filed a return within the due time as prescribed under sub-section (1) or (2) of Section 139 would get benefit by filing the return under Section 139(4) much later. This cannot certainly be the legislative intent.
>
> Another plea which was urged with some amount of vehemence was that the provisions of Section 276-CC are applicable only when there is discovery of the failure regarding evasion of tax. It was submitted that since the return under sub-section (4) of Section 139 was filed before the discovery of any evasion, the provision has no application. The case at hand cannot be covered by the expression 'in any other case'. This argument though attractive has no substance.
>
> The provision consists of two parts. First relates to the infractions warranting penal consequences and the second, measure of punishment. The second part in turn envisages two situations. The first situation is where there is discovery of the failure involving the evasion of tax of a particular amount. For the said infraction stringent penal consequences have been provided. Second

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situation covers all cases except the first situation elaborated above.

The term of imprisonment is higher when the amount of tax which would have been evaded but for the discovery of the failure to furnish the return exceeds one hundred thousand rupees. If the plea of the appellants is accepted, it would mean that in a given case where there is infraction and where a return has not been furnished in terms of sub-section (1) of Section 139 or even in response to a notice issued in terms of sub-section (2), the consequences flowing from non-furnishing of return would get obliterated. At the relevant point of time Section 139 (4)(a) permitted filing of return where return has not been filed within sub-section (1) and sub-section (2). The time-limit was provided in clause (b). Section 276-CC refers to 'due time' in relation to sub-sections (1) and (2) of Section 139 and not to sub-section (4). Had the legislature intended to cover sub-section (4) also, use of the expression 'Section 139' alone would have sufficed. It cannot be said that the legislature without any purpose or intent specified only sub-sections (1) and (2) and the conspicuous omission of sub-section (4) has no meaning or purpose behind it. Sub-section (4) of Section 139 cannot by any stretch of imagination control operation of sub-section (1) wherein a fixed period for furnishing the return is stipulated. The mere fact that for purposes of assessment and carrying forward and to set off losses it is treated as one filed within sub-section (1) or (2) cannot be pressed into service to claim it to be actually one such, though it is factually and really not by extending it beyond its legitimate purpose.

Whether there was wilful failure to furnish the return is a matter which is to be adjudicated factually by the court which deals with the prosecution case. Section 278-E is relevant for this purpose and the same reads as follows:

'278-E. Presumption as to culpable mental state.—(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

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Explanation. — In this sub-section, 'culpable mental state' includes intention, motive or knowledge of a fact or belief in, or reason to believe, a fact.

(2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.'

There is a statutory presumption prescribed in Section 278-E. The court has to presume the existence of culpable mental state, and absence of such mental state can be pleaded by an accused as a defence in respect to the act charged as an offence in the prosecution. Therefore, the factual aspects highlighted by the appellants were rightly not dealt with by the High Court. This is a matter for trial. It is certainly open to the appellants to plead absence of culpable mental state when the matter is taken up for trial.

Looked at from any angle, the appeals are without merit and are dismissed."

13. Actually, the above case answers almost all the grounds raised by the revision petitioners :

Non-filing of returns under Section 139(1) does not get condoned even if a return is filed under Section 139(4) and the infraction continues. That is the intent of the statute.

In the instant case, returns have not been filed till date and the charge is not only for non-filing of returns under Section 139 (1), but also failure to respond to notice under Section 142(1).

Section 276CC cannot be said to be applicable only when there is discovery of the failure regarding evasion of tax. Therefore, what follows from the above ratio laid down by the Supreme Court is that even if evasion of tax is not established, the prosecution may proceed for the offence of non-filing of returns.

Thus, the argument that unless there is quantification of the tax evaded, the prosecution cannot proceed loses strength.

It is held in the above case that mention of Section 139(1) cannot be construed to include Section 139(4), for if that were the legislative intent, the words used would have been Section 139.

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In the present case, therefore, the proviso can be said to apply only to the offence of failure to furnish in due time the returns under Section 139(1). This is a case where returns have not been filed and the charge is also one under Section 142(1). Therefore, the proviso cannot apply to the present case. The proviso shall only protect a person whose offence is failure to furnish in due time the return of income under sub-section (1) of Section 139. When the Supreme Court has held that the infraction cannot be condoned even if a return is filed under sub-section (4) of Section 139 and such a person cannot get the benefit of the proviso, much less can the petitioners, who have not filed the returns at all, expect to benefit from the said proviso.

The expression 'in due time' is significant and it cannot be said that the said expression was used without any purpose.

14. In view of what was held in Prakash Nath's case, even the submissions which relate to the consequences of penalty proceedings and the effect they have on the prosecution's case cannot be accepted, since as per this decision, failure to furnish in due time the returns under Section 139(1) is a continuing infraction. This position that it is a continuing offence has been reiterated in A.I.R. 1986 S.C. 293 [Maya Rani Punj vs. Commissioner of Income Tax]. To the question that was raised as to whether default of non-filing of the returns within the time stipulated by law is not a continuing offence, the Supreme Court answered in the affirmative and held that, "If a duty continues from day-to-day, the non-performance of the duty from day-to-day is a continuing wrong".

15. The decision in (1991) 3 S.C.C. 442 [Tribhovandas Haribhai Tamboli vs. Gujarat Revenue Tribunal] was cited by the respondents to counter the contentions raised on behalf of the petitioners that applying the proviso, proceedings cannot be continued. The folllowing extract is relevant :

> "It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field, which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted by the proviso and to no other. The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is to confine to that case. Where the language of the main enactment is explicit and unambiguous, the proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it, by implication what clearly falls within its express terms. The scope of the proviso, therefore, is to carve out an exception to the main enactment and it

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excludes something which otherwise would have been within the rule. It has to operate in the same field and if the language of the main enactment is clear, the proviso cannot be torn apart from the main enactment nor can it be used to nullify by implication what the enactment clearly says nor set at naught the real object of the main enactment, unless the words of the proviso are such that it is its necessary effect."

16. The jurisdiction of the Court in considering an application for discharge has been dealt with by the supreme Court in (2000) 5 S.C.C. 679 [Om Parkash Sharma vs. C.B.I., Delhi]. In that case, the Supreme Court considered this issue in detail, though it was with reference to Sections 227 and 239 of the Code of Criminal Procedure. But, it equally applies to an application under Section 245 of the Code. The Supreme Court held that the stage at which the application is made is a stage of consideration anterior in point of time to framing of charges, where the Court shall consider the record of the case, the police report and the documents submitted therewith, and the Court is obliged to consider whether there is sufficient ground to proceed against the accused. The following observations of the Supreme Court were relied on by the petitioners to show that this exercise was not done by the trial court while hearing the application filed by the petitioners for discharge :

> "If the accused could produce any reliable material even at that stage which might totally affect even the very sustainability of the case, a refusal to even look into the materials so produced may result in injustice, apart from averting an exercise in futility at the expense of valuable judicial/public time".

Further down in the same paragraph, the Supreme Court also cautions the trial courts against undertaking a roving enquiry into the pros and cons of the case by weighing the evidence or collecting materials, as if during the course or after the trial. The Supreme Court also holds that this would depend on the facts of each case and also that the Court concerned, namely the Magistrate's Court, must be allowed a large latitude in the matter of exercise of discretion, and unless the Court conducts itself in so demonstrably an unreasonable manner unbecoming of a judicial authority, the superior Court shall not intervene very lightly or in a routine fashion. The reason being, at that stage, "the question is one of mere proprieties involved in the exercise of judicial discretion by the Court and not of any rights concretised in favour of the accused". The following paragraph is relevant and is, therefore, extracted hereunder :

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"Therefore, it is to be only seen as to whether the trial court has judiciously and judicially exercised its discretion. The trial court as also the High Court, seem to have properly applied their minds by going into the nature of the documents sought to be summoned, their bearing and relevance for the nature of consideration to be made at that stage of the proceedings before the Special Judge as well as the necessity and desirability whereof. The consideration so made by the courts below in rejecting the claim of the appellant, could not be held to be either condemnable or constitute any gross or improper failure to exercise their jurisdiction and consequently, it does not call for any interference in our hands."

17. The orders impugned in these revisions show that the learned Magistrate has considered all the submissions made by both sides, has framed the questions for consideration, has dealt with each of them and has come the conclusion that the questions raised by the petitioners must be tested, substantiated and adjudicated at the time of trial and that the proceedings are at the preliminary stage and whatever observations had been made, are only for the purpose of the discharge application and they will not have a bearing on the final decision in the main case. The learned Magistrate has also rightly held that the probative value of the materials on record cannot be gone into at this stage. The learned Magistrate has also dealt with in detail the objections regarding the validity of the sanction. We have already seen in the above extracts from Om Parkash Sharma's case (supra) that the Magistrate's Court must be allowed a large latitude in the matter of exercise of discretion and unless the Court conducts itself in an unreasonable manner, the superior Court shall not interfere. The following observations of the Supreme Court in the above case are relevant :

"Therefore, it is to be only seen as to whether the trial court has judiciously and judicially exercised its discretion. The trial court as also the High Court, seem to have properly applied their minds by going into the nature of the documents sought to be summoned, their bearing and relevance for the nature of consideration to be made at that stage of the proceedings before the Special Judge as well as the necessity and desirability whereof. The consideration so made by the courts below in rejecting the claim of the appellant, could not be held to be either condemnable or constitute any gross or improper failure to exercise their jurisdiction and consequently, it does not call for any interference in our hands. Therefore, the appeal fails and shall stand dismissed."

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The Supreme Court, in the above case, also held that it would be difficult to lay down a rule of universal application and for all times and that is why large latitude in the matter of exercise of discretion is given to the Court concerned. As observed by the Supreme Court in (1989) 1 S.C.C. 715 [Stree Atyachari Virodhi Parishad vs. Dilip Nathumal Chordia], self-restraint on the part of the High Court should be the rule unless there is glaring injustice.

18. In (1994) 4 S.C.C. 659 [State of Maharashtra vs. Som Nath Thapa], the Supreme Court has observed thus :

> "..... The aforesaid shows that if on the basis of materials on record, a court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the court were to think that the accused might have committed the offence, it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of a charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage."

This course has been followed by the learned Magistrate; and even if there be a different opinion, that is no ground for the High Court to interdict the trial – vide (1989) 1 S.C.C. 715 (supra).

19. It is difficult to hold that the trial Magistrate had conducted himself either unreasonably or injudiciously. It is, no doubt true, the counsel for the petitioners strenuously urged that the learned Magistrate had not considered whether the accused was "in charge of the business of the firm"; the learned Magistrate had also not considered the coutcome of the proceedings before the Tribunal and other relevant materials that were brought to his knowledge and therefore, the order is vitiated. I am afraid, I have to disagree with this contention. At this stage, the Magistrate is not required to appreciate the evidence so as to conclude whether the materials produced are sufficient or not for convicting the accused – vide (2000) 6 S.C.C. 338 [State of M.P. vs. Mohanlal Soni]; all that the Magistrate should do is to consider whether the materials on record, if generally accepted, would make out the offence. The evidence will be tested at the trial stage. This is what the learned Magistrate has observed. The learned Magistrate was also conscious of the fact that in the present case, the presumption under Section 278E of the Act operates and therefore, at that prima facie stage, the Court will have to presume the culpable mental state of the accused. Therefore, the materials placed by the prosecution would, if unrebutted, prove

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the case against the accused. If that is so, the language of Section 245 of the Code indicates that this is the only order that the learned Magistrate could have passed. As seen from Vaidyanatha Iyer's case (supra), the Court must presume culpable mental state on the part of the accused.

20. The petitioners complain that the trial Magistrate had merely acted as a post-office of the prosecution and had not considered any of the materials nor has he sifted the evidence, as he is bound to, as per several decisions of the Supreme Court. The evidence recorded was read out. It was submitted that it was unfair on the part of the prosecution witness to feign ignorance of the appeal proceedings when it was he who had initiated it. I am not sitting in appeal. If there were materials sufficient for the Magistrate to form a prima facie opinion that the offence was made out, that is enough. The Supreme Court says that even if there may be a different opinion, the High Court cannot interdict the trial. A perusal of the impugned orders would show that the learned Magistrate has considered all the materials and has correctly held that the accused will have to prove their case at the time of trial. Section 245 of the Code requires the Magistrate to discharge the accused if no case is made out against him warranting his conviction, if unrebutted. In the present case, in view of the operation of Section 278E, unless it is rebutted, conviction will have to follow if the prosecution has proved the other factors, namely non-filing of the returns, under the circumstances spelt out in the Section. It is not open to the Magistrate to conduct a mini trial at this stage and to conclude that no case is made out. There is nothing in the impugned order to indicate that the learned Magistrate has accepted word-for-word, the case of the prosecution and had acted as a post-office. At this stage, even a very strong suspicion founded upon materials before the Magistrate which lead him to form a presumptive opinion as to the factual ingredients constituting the offence alleged may justify the framing of charge - vide A.I.R. 1980 S.C. 52 [R.S. Nayak vs. A.R. Antulay]. In that case, the Supreme Court considered the scope of Sections 227, 239 and 245 of the Code of Criminal Procedure and held that inspite of the difference in the language of the three sections, the legal position is that, if the trial court is satisfied that a prima facie case is made out against the accused, charge has to be framed. Similarly, in A.I.R. 1979 S.C. 366 [Union of India vs. Prafulla Kumar], the Supreme Court observed as follows :

> "A Magistrate holding an enquiry is not intended to act merely as a recording machine. He is entitled to sift and weigh the materials on record, but only for seeing whether there is sufficient evidence for commitment, and not whether there is sufficient evidence for conviction. If there is no prima facie evidence or the evidence is

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totally unworthy of credit, it is his duty to discharge the accused; if there is some evidence on which a conviction may reasonably be based, he must commit the case."

21. The learned Magistrate was bound to keep in mind the statutory presumption, since the law requires him to do so. In A.I.R. 1958 S.C. 61 [State of Madras vs. A. Vaidyanatha Iyer], the Supreme Court set aside the order of acquittal passed by the High Court on the ground that where there is a presumption of law, it is obligatory on the court to raise this presumption, which in that case was the presumption under Section 4 of the Prevention of Corruption Act, because unlike a case of presumption of fact, presumption of law constitutes a branch of jurisprudence and this special rule of burden of proof cannot be disregarded. The Supreme Court held that the approach of the High Court in that case had been on erroneous lines since the special rule of the burden of proof had been disregarded.

22. In A.I.R. 1962 S.C. 1052 [Izhar Ahmad vs. Union of India], which arose under the Citizenship Act, there is reference to various texts with regard to presumption. The Supreme Court in this case observed as follows :

"In other words, the rule takes away judicial discretion either to attach the due probative value to fact 'A' or not and requires prima facie the due probative value to be attached in the matter of the inference as to the existence of fact 'B', subject of course, to the said presumption being rebutted by proof to the contrary."

23. In 2004 (7) 15 [Monaben Ketanbhai Shah vs. State of Gujarat], which dealt with the presumption under the Negotiable Instruments Act, 1881 and the correctness of the order of the Magistrate discharging the appellants, the Supreme Court held as follows :

"These provisions create a statutory presumption of dishonesty, exposing a person to criminal liability if payment is not made within the statutory period even after issue of notice. It is also true that the power of quashing is required to be exercised very sparingly and where, read as a whole, factual foundation for the offence has been laid in the complaint, it should not be quashed. All the same, it is also to be remembered that it is the duty of the court to discharge the accused if taking everything stated in the complaint as correct and construing the allegations made therein liberally in favour of the complainant, the ingredients of the offence are altogether lacking."

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24. On the side of the petitioners, elaborate arguments were advanced as to the total misconception of the provisions of the Partnership Act by the learned Magistrate, who had held that there was no such thing as a dormant partner and the various extracts from the evidence recorded by the learned Magistrate in the discharge petitions were also referred to, to show that prosecution ought not to have been initiated against the first and the second petitioners. But this is a matter to be considered at the time of trial. It has been so held in 179 I.T.R. 558 [Geethanjali Mills Ltd. vs. Thiruvengadathan] :

> "The fact that the Tribunal has passed an order of remand in assessment proceedings would not be a bar to prosecution for offences under the Income-Tax Act. Mere expectancies should not stand in the way of the criminal court proceeding in the matter. The High Court cannot stop any proceedings against an assessee in a criminal court on mere expectancy."

> "It is further made clear that the person in charge of and responsible to the company for the conduct of its business is not liable to any punishment, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence. Whether the aforesaid persons were in charge of and were responsible for the conduct of the business of the company, is again a matter for evidence to be considered during trial. If it is found that they were actually in charge of, and responsible for the conduct of the business of the company, then it is for them to prove that the offence had been committed without their knowledge and despite due diligence on their part to prevent the commission of such offence. The onus in such an eventuality is shifted to them. Criminal proceedings would not, therefore, be vitiated merely because it has been launched against nominee directors of the State Financial Corporation or the Industrial Development Bank of India."

25. In 2005 (8) S.C.C. 89 [S.M.S. Pharmaceuticals Ltd. vs. Neeta Bhalla], which dealt with an offence under the Negotiable Instruments Act alleged to have been committed by a company, the Supreme Court held that there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. Section 141 of the Negotiable Instruments Act Act contains the conditions which have to be

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satisfied before the liability can be extended to officers of a company and since the provision creates criminal liability, the conditions have to be strictly complied with. A person who has nothing to do in the matter need not be roped in. The proviso to the sub-section contains an escape route for persons who are able to prove that the offence was committed without their knowledge or that they had exercised all due diligence to prevent the commission of the offence. At the time of issuing of the process, the Magistrate is required to see only the allegations in the complaint and where allegations in the complaint or the charge sheet do not constitute an offence against the person, that complaint is liable to be dismissed. The Supreme Court observed as follows :

> "A person who is sought to be made the accused has no right to produce any documents or evidence in defence at that stage. Even at the stage of framing of charge, the accused has no such right and a Magistrate cannot be asked to look into the documents produced by an accused at that stage."

With regard to the satisfaction of Section 141, the Supreme Court held thus :

> "Even a non-director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial.
>
> .....
>
> It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of the business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied."

It was observed by the Supreme Court that for the purpose of fastening the criminal liability, there is no presumption that every partner knows about the transaction, and the obligation of the appellants to prove that at the time the offence was committed, they were not in charge of and were not responsible to the firm for the conduct of the business of the firm, would arise only when first the complainant makes necessary averments in the complaint.

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26. Section 278B of the Act deals with offences by companies. As per the explanation to this Section, a company includes a firm and where an offence under this Act has been committed by a company, every person who at the time of the offence was in charge and was responsible for the conduct of the business of the company shall be deemed to be guilty of the offence. Therefore, the prosecution will have to prove that the accused were in charge and responsible for the conduct of the business of the company. Once they prove it, the deeming provision will take effect. But however, there is a proviso to the said Section to the effect that such a person will not be liable to any punishment if he proves that the offence was committed without his knowledge or that he had exercised due diligence to prevent the commission of such offence. According to the petitioners, materials had been produced before the learned Magistrate to show that they were not in charge of the firm. But as observed earlier, at this stage, the Magistrate does not conduct a mini trial. The learned Magistrate has rightly held that there is ample time for the petitioners to prove during the trial that they are not guilty of the offences alleged against the firm.

27. In the present case, the Partnership Deed is filed along with the complaint, and necessary averments have been made. If the averments remain unrebutted, the prosecution's case would have been made out. What is required is for the learned Magistrate to be satisfied on the basis of the complaint that there were sufficient grounds in the complaint making out an offence against the accused. In the present case, the learned Magistrate appears to have been satisfied on the basis of the averments and the records, which included the partnership deed, and the exercise of discretion appears to have been done properly. The learned Magistrate, on a perusal of the materials, was prima facie satisfied that the petitoners were the persons in charge of the firm at the relevant time. Therefore, both sides will have to prove their case at time of trial.

28. Arguments were also advanced with regard to the validity of the sanction. The sanction order has also been produced in the paper book furnished by the petitioners. It was dealt with threadbare by the learned counsel for the petitioners. In 1997 (7) S.C.C. 622 [Mansukhlal Vithaldas Chauhan vs. State of Gujarat], a sanction order was challenged. Several important principles can be culled out from this decision and they are that - (a) it is not an automatic formality; (b) public interest should be kept in mind; (c) it is a weapon to ensure discouragement of frivolous and vexatious prosecution; (d) it must ex facie disclose that the authority had considered the evidence and other materials; (e) the authority has to apply its own independent mind; and (f) it should not be under pressure from any quarter. Tested against these guidelines, the Supreme Court, in that case, held that the sanction order was bad because the sanction order was given by the Secretary on the

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direction of the High Court to grant sanction. Therefore, the Supreme Court held that the High Court closed all other alternatives to the Secretary. But in the same case, the Supreme Court spelt out five tests to be applied for reviewing the sanction order. These five tests have already been extracted in Ground No.(10) of paragraph 5 above.

29. A reading of the sanction order in the present case shows that the sanctioning authority had considered all the materials produced on both sides. The opinion of the Senior Public Prosecutor, as also the opinion given by a retired Supreme Court Judge were before the sanctioning authority. Merely because it is stated in the order that "after going through all the relevant papers and documents and taking into consideration the opinion given by the Senior Public Prosecutor, the order was passed" does not in any way indicate that the mind of the sanctioning authority was so influenced by the opinion of the Senior Public Prosecutor that he had no option but to order the sanction. In fact, the sanctioning authority has observed that from the records, a wilful failure on the part of the assessee is evident and that he finds that there is a strong case for launching prosecution against the accused. It is seen from the sanction order that though no opportunity of personal hearing need be given, the authority had heard the assessee on 23.9.1996. Therefore, the five tests, viz. (i) whether the decision-making authority exceeded its powers?; (ii) committed an error of law; (iii) committed a breach of the rules of natural justice; (iv) reached a decision which no reasonable Tribunal would have reached; or (v) abused its powers does not appear to have been violated by the sanctioning authority. Therefore, the attack on the validity of the sanction is rejected. The sanctioning authority had also been examined and he had indicated his independent application of mind. In fact, it is not necessary for me, in exercise of revisional jurisdiction, to dwell deep into all the records produced by the petitioners since I am not sitting in appeal over the decision of the court below and unless the order of sanction shocks the conscience of the Court and there is flagrant abuse of the power of the authority, the power of judicial review of this Court, which is well defined, must be and will be exercised within the above parameters.

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30. Several decisions have been cited where the prosecution proceedings were quashed in view of the outcome of the penalty proceedings or appellate proceedings, as the case may be, and they are discussed hereunder.

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31. (2005) 10 S.C.C. 451 [Gurunanak Enterprises vs. Income Tax Officer] was a case where there was delayed filing of income tax return and it was held therein that it was covered by the proviso to Section 276C and there was failure to furnish the return in due time. In the present case, no return has been filed.

32. Similarly, 173 I.T.R. 554 [Gopalji Shaw vs. Income Tax Officer] was a case where the petitioner had filed the return on February 15, 1985 instead of July 31, 1982. In that case, penalty proceedings under Section 271(1)(a) were initiated against the petitioner for delay in filing the return, but no order had been passed and therefore, the learned Judge of the Calcutta High Court held that this meant that the Income Tax Officer did not find any reason to penalise the petitioner for the delay in filing the return and that when the Officer, while making the assessment, charges interest under Section 139(8), no criminal proceedings can be launched since wilful default in filing the return has to be established and by charging interest, the Officer had impliedly extended the time to file the return and therefore, the question of wilful default does not arise; unless there is wilful default, no prosecution can be launched against the petitioner and in that view of the matter, the initiation of criminal proceedings must be quashed. In 199 I.T.R. 307 [K. Jagadeesan vs. Income Tax Officer] this view has not been accepted and the contention that since interest has been charged for delay in filing the return amounts to extension of time and therefore, the prosecution is not permissible was rejected and this Court has held that interest, penalty and prosecution stand on a different footing. In any event, this question does not arise in the case on hand, since till date, the petitioners have not filed the returns.

33. In 225 I.T.R. 509 [B.P. Bhaskar vs. State of Bihar], the prosecution was quashed on the ground that the penalty proceedings had been dropped on merits and that it would not be just and expedient to allow the prosecution of the petitioner to continue.

34. In (2004) 2 S.C.C. 731 [K.C. Builders vs. Assistant Commissioner of Income Tax], the Tribunal allowed the appeal and cancelled the penalty and this was not appealed against and had become final and conclusive. The order of the Tribunal was also marked before the learned Magistrate, before whom the application to drop the criminal proceedings were filed. The learned Magistrate dismissed the application and the High Court refused to interfere. The Supreme Court held that once the penalties were cancelled, there is no concealment and the quashing of the prosecution is, therefore, automatic.

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35. In 1982 (133) I.T.R. 909 [Uttam Chand vs. Income Tax Officer], the Supreme Court held that in view of the finding recorded by the appellate tribunal that 'J' was a partner of the firm and that the firm was genuine, the prosecution under Section 277 of the Income Tax Act for filing false returns has to be quashed. In 1993 (68) Taxman - Tax Reports 300 [Smt. Pushpa Maini vs. I.T.O.], the High Court of Punjab and Haryana held that in the absence of an offence that partners of the firm were either in charge or responsible, they cannot be prosecuted for any offence under Sections 276C and 277. In 1996 Crl. L.J. 449 [M/s. Shastri Sales Corporation vs. I.T.O.], when the penalty proceedings were quashed by the final authority under the Income Tax Act, the continuation of criminal proceedings thereafter was held not permissible and the accused entitled to be discharged.

36. In 1997 (92) Taxman - Tax Reports 253 [I.T.O. vs. Inderjit Chopra], the Punjab and Haryana High Court held that where penalty under Section 271(1)(c) of the Act was quashed by the Tribunal on the finding that there was no concealment of income by the assessee, there was no justification for prosecution of the assessee and the same must, therefore, be quashed. The gravamen of the charge in the complaint filed against the respondent in that case is concealment of income and/or furnishing of inaccurate particulars by the respondent for the assessment year 1980-81 and on the same facts, penalty orders were quashed. When admittedly penalty orders had been quashed on the footing that there is no such concealment of income, there is no justification to proceed with the prosecution of the respondent on the same ground. To the same effect is 1997 (224) I.T.R. 119 [Mahadeo Lal Agarwala vs. State of Bihar], which also deals with proceedings under Section 271(1)(c). The Supreme Court, in that case, held that the prosecution cannot be sustained since the question whether the appellant/assessee had made a false statement had been concluded by the finding of the appellate tribunal. 1998 (233) I.T.R. 783 [Sureshchand Gupta vs. Union of India] was also a case where the prosecution was quashed in view of the deletion of penalty by the Tribunal.

37. In 1999 (106) Taxman - Tax Reports 536 [Sheo Shankar vs. Commissioner of Income Tax], the Patna High Court quashed the criminal prosecution on the ground that when the prosecution was based on the assessment for a particular year and that assessment had been set aside in appeal, there was no justification to continue the prosecution. In 2001 (3) S.C.C. 459 [Commissioner, Income Tax vs. Bhupen Champak Lal Dalal], the High Court had stayed the proceedings and that order was not interfered with. In 2002 (123) Taxman - Tax Reports 891 [Ram Gulam Shah & Sons vs. Commissioner of Income Tax], the Patna High Court held that in the absence of any finding of the

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appellate authority and Tribunal that there was wilful evasion of tax and there was mens rea in concealing the income, launching the prosecution was wholly unwarranted. In 2002 (123) Taxman – Tax Reports 51 [Satyanarain Prasad vs. State of Bihar], the Patna High Court held that when the order of the assessing authority, on the basis of which the complaint is filed, is not accepted, then prosecution will be abuse of process of court.

38. In 2002 (120) Taxman – Tax Reports 253 [Ravi Medical Agencies vs. Union of India], proceedings were initiated under Section 276C read with Section 278 of the Income Tax Act and the violation related to the assessment year 1988-89. The penalty proceedings ended in favour of the assessee and therefore, the Supreme Court held that the very foundation of the prosecution was demolished. To the same effect is 2002 (120) Taxman – Tax Reports 805 [Ruchi Associates (P) Ltd. vs. Assistant Commissioner of Income Tax]. In 2005 (275) I.T.R. 268 [Tata Robins Fraser Ltd. vs. State of Jharkhand], proceedings were initiated under Sections 276C and 277 of the Income Tax Act and in addition, a penalty proceeding under Section 277(1)(c) was initiated that the accused persons had attempted to evade tax by furnishing incorrect particulars of income and they claimed deduction on account of excise duty raised by the department. The Tribunal allowed the demand of excise duty as allowable expenditure and the original order of assessment had been modified. The Jharkhand High Court held that the pendency of the case will not serve any of the parties since the original order of assessment had been modified.

39. The question whether prosecution proceedings for offences punishable under Sections 276CC and 277 of the Income Tax Act are liable to be quashed while assessment proceedings under the Act are pending was considered by the Supreme Court in (1984) Supp. S.C.C. 437 [P. Jayappan vs. S.K. Perumal, 1st I.T.O.], the question was whether prosecutions or offences punishable under Sections 276C and 277 of the Income Tax Act are liable to be quashed while re-assessment proceedings under the Act are pending. The Supreme Court observed thus :

> "No other legal bar for the institution of the proceedings is urged except stating that in the event of the petitioner being exonerated in the reassessment proceedings, the prosecutions may have to be dropped. It is true that as observed by this Court in Uttam Chand v. ITO [(1982) 133 I.T.R. 909] the prosecution once initiated may be quashed in the light of a finding favourable to the assessee recorded by an authority under the Act

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subsequently in respect of the relevant assessment proceedings but that decision is no authority for the proposition that no proceedings can be initiated at all under Section 276-C and Section 277 as long as some proceeding under the Act in which there is a chance of success of the assessee is pending. A mere expectation of success in some proceeding in appeal or reference under the Act cannot come in the way of the institution of the criminal proceedings under Section 276-C and Section 277 of the Act."

.....

"It may be that in an appropriate case the criminal court may adjourn or postpone the hearing of a criminal case in exercise of its discretionary power under Section 309 of the Code of Criminal Procedure if the disposal of any proceeding under the Act which has a bearing on the proceedings before it is imminent so that it may take also into consideration the order to be passed therein. Even here the discretion should be exercised judicially and in such a way as not to frustrate the object of the criminal proceedings. There is no rigid rule which makes it necessary for a criminal court to adjourn or postpone the hearing of a case before it indefinitely or for an unduly long period only because some proceeding which may have some bearing on it is pending elsewhere. But this, however, has no relevance to the question of maintainability of the prosecution."

Finally, the three Judge Bench held that the pendency of the re-assessment proceedings cannot act as a bar to the institution of a criminal prosecution.

40. The decision in 254 I.T.R. 292 [R.L. Sahni vs. R. Singh] was cited to show that under Section 276CC of the Income Tax Act, where in the appellate proceedings the income had been assessed and refund ordered, which was not challenged further, prosecution under Section 276CC was held not valid, relying on the proviso to Section 276CC.

41. We have already seen in paragraphs 13 and 14 of this order, how Section 276CC of the Act has to be construed and also that wilful failure to file the returns within due time is a continuing offence. At the cost of repetition, it has to be stated that in this case, till date, no returns have been filed and as seen from P. Jayappan's case (supra), there is no rigid rule even for adjournment or postponement of the hearing of a case before a criminal court only

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because some proceeding which may have a bearing on that case is pending elsewhere. The judgment in Prakash Nath Khanna's case (supra) actually supports the respondent's stand that prosecution should continue.

42. In (2006) 4 S.C.C. 278 [Standard Chartered Bank vs. Directorate of Enforcement], in which the constitutionality of the provisions of the Foreign Exchange Regulation Act (FERA) was challenged, the Supreme Court rejected the contention that without there being an adjudication, there can be no prosecution. The Supreme Court distinguished the decision in K.C. Builders's case (supra) and in fact, observed that the decision in K.C. Builders may require re-consideration as the reasonable power to run counter to the one adopted by the Constitution Bench in Assistant Collector of Customs vs. L.R. Melwani [(1969) 2 S.C.C 438].

43. In A.I.R. 1970 S.C. 962 [Asst. Collector of Customs vs. L.R. Melwani], one of the questions was, whether the prosecution is barred under Article 22 by reason of the decision of the Collector of Customs in proceedings initiated under the Sea Customs Act. The Supreme Court held that criminal prosecution of the accused for the alleged smuggling is not barred merely because proceedings were earlier initiated against him before the Collector of Customs, which ended in his favour.

44. In 194 I.T.R. 690 [Dr. (Mrs.) M.S. Dhowani vs. J. Ranganathan, 2nd I.T.O.], a learned single Judge of this Court observed as follows :

> "I am unable to agree that the offences under Sections 276C(1) and 277 of the Act will be non-existent unless and until the assessment is contemplated. As long as there is no provision for a mandatory notice before prosecution, I am unable to uphold the contention that the principles of natural justice have been violated. The petitioner will have sufficient opportunity to put forth his defence before the trial magistrate and the principles of natural justice are thus abundantly safeguarded."
>
> .....
>
> "However, the criminal court is bound to give due regard to the result of any proceeding under the Income-Tax Act, having a bearing on the question in issue and, in an appropriate case, may drop the proceeding in the light of an order passed under the Act. It does not mean that the result of a proceeding under the Act would be binding on the criminal court, for the criminal court has to independently judge the case on the evidence placed before it."

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45. For all the reasons stated above, the criminal revisions are dismissed. However, there will be no order as to costs. Consequently, M.P. Nos.1, 2, 2 and 2 of 2006 are closed.

ab

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Additional Chief Metropolitan Magistrate (E.O.I),
   Chennai.

2. -do- Through The Chief Metropolitan Magistrate,
   Egmore, Madras.

3. The Asst. Commissioner of Income Tax,
   Central Circle II(5),
   Madras.

4. The Public Prosecutor,
   High Court, Madras.

6 ccs to Mr.N.Jothi, Advocate, SR.59420
1 cc to Mr.P.Wilson, Asst. Solicitor General of India, SR.56422
1 cc to Mr.K.Ramasamy, Sr.Spl. Public Prosecutor for Government of India, SR.56424

tej (co)

dv/2.12.06

Crl. R.C. Nos.781 to 786 of 2006

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